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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 610

INDIANA REVENUE BOARD, ET AL.
Petitioners,

vs.

STATE OF INDIANA, on the relation of the City of Indianapolis, as successor in interest to the Mass Transportation Authority of Greater Indianapolis, a Municipal Corporation, and RICHARD M. GIVAN and JOHN F. NEFF,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

At pages 7 through 15 of the Respondents' Brief, Respondents present an argument based solely on the proposition that the due-process questions were not presented to the trial court. In this case the trial court was the Appellate Court of the State of Indiana.

On page 9 the Respondents make the following positive statement:

> "Second, under no circumstances can it be said that the federal question of denial of due process was raised at the trial level in this case, and, thus under Indiana law seasonably raised."

The truth is that Federal due-process questions were presented to the trial court on at least three occasions;

(1) On November 14, 1969, these Petitioners filed their Motion for a New Trial which included the following assignment of errors:

> "6. The Court erred in its Order of October 21, 1969, and November 6, 1969, in substituting Trudy Slaby Etherton as Auditor of the State of Indiana and as a member of the Indiana Revenue Board for John P. Gallagher as Auditor of the State of Indiana and as a member of the Indiana Revenue Board one of the judgment defendants on the Court's own motion and without process contrary to the Statutes and Case Law of the State.
>
> "7. That the action of this Court in substituting Trudy Slaby Etherton as Auditor of the State of Indiana and as a member of the Indiana Revenue Board for judgment defendant John P. Gallagher, Auditor of the State of Indiana on its own motion and without process is repugnant to the 'due process clause' of the 14th amendment of the United States Constitution and Article I, Section 12 of the Indiana Constitution."

(2) On November 19, 1969 in the "Response of Auditor of the State of Indiana to Order entered herein on November 19, 1969" the following was presented to the trial court:

> "5. That this affiant is apparently to be joined in this proceeding purely on the Court's own motion by substituting this affiant's name for the name of the judgment defendant John P. Gallagher, as Auditor, contrary to the statutes of the State of Indiana dealing with the substitution of parties as found in Acts of 1881 (Spec. Sess.), Ch. 38, Sec. 848, p. 240, Burns' IND. STAT. ANN. § 2-228.

"6. Affiant further shows the Court that joining this affiant as a party defendant herein without service of process as required by the statutes of the State of Indiana is repugnant to the due process clause of the United States Constitution."

(3) Finally, the Auditor's "Answer to Rule to Show Cause" filed on February 16, 1970 the following was presented to the trial court:

"3. The order of this Court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1, Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that the major portion of the money represented is to eventually be turned over to the Mass Transportation Authority of Greater Indianapolis by persons other than the Auditor of State or the Treasurer of State. The Mass Transportation Authority of Greater Indianapolis is a municipal corporation created by Acts of 1967, Ch. 311, which Act was repealed by and which municipal corporation was abolished by Acts of 1969, Ch. 173, Sec. 1003, effective January 1, 1970. Thus there is no recipient for the major portion of the money represented by the warrant.

"4. The order of this Court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1 Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that a large portion of the money represented by such warrant is to be turned over by persons other than the Auditor of State or the Treasurer of State to the attorneys of record of the Mass Transportation Authority of Greater Indi-

anapolis who are not parties to this action and whose rights or claims of rights have never been litigated before this Court.

"5. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1 Sec. 12 of the Indiana Constitution; and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that it orders the Auditor of State to issue her warrant and states that a large portion of the money represented by such warrant is to be turned over by persons other than the Auditor of State or the Treasurer of State to the attorneys of record of the Mass Transportation Authority of Greater Indianapolis. An order of mandate may be issued against any public officer "to compel the performance of any act which the law specifically enjoins" (Acts of 1881 [Spec. Sess.], Ch. 38, Sec. 804, as amended by Acts of 1911, Ch. 223, Sec. 2). There is not now nor has there ever been any law enjoining the Auditor of State to issue her warrant for money to be so paid.

"6. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and is repugnant to Art. 10, Sec. 3 of the Indiana Constitution which provides 'no money shall be drawn from the treasury, but in pursuance of appropriations made by law" and Art. 3, Sec. 1 of the Indiana Constitution which provides for the division of governmental powers in that said order attempts to make an appropriation of tax funds.

"And insofar as said order requires this Respondant to violate her oath of office, the Constitution of the State and the state statutes guiding and directing her in performing her duties as Auditor of the State of Indiana, and appropriates the powers of her office, said order is repugnant to the 'due course of law' clause in Art. 4, Sec. 24, of the Indiana Constitution and the 'due process' clause of the 5th and 14th Amendments of the United States Constitution.

"The statutes referred to are as follows:

CRIMINAL STATUTE

Burns' § 10-3715—'If the auditor of state shall draw any warrant upon the treasurer of state, unless there be money in the treasury belonging to the particular fund upon which such order is drawn to pay the same, and in conformity to appropriations made by law, he shall, on conviction, be fined not less than one hundred dollars [$100] nor more than one thousand dollars [$1,000] and be imprisoned in the county jail not less than one [1] month nor more than six [6] months. [Acts 1905, ch. 169, § 520, p. 584.]'

CIVIL STATUTES

Burns' § 49-1809—'The treasurer of state is expressly prohibited from paying any money out of, or transferring any money from, the treasury of state, except upon the warrant of the auditor of state; and the auditor shall examine, with care, every demand and claim presented for payment, and shall be satisfied that every claim is just, legal, and unpaid, before he shall allow, audit, or countersign it; and, for that purpose, may require the affidavit of the claimant, or other evidence; and he shall require every claim to specify the particular items of indebtedness. But when satisfied that any claim is just, legal and unpaid, and if there be money to the credit of the fund, and not before, the auditor shall issue his warrant on the treasurer for its payment out of the proper fund; and if there be money of such fund in the treasury when the warrant is presented, the treasurer shall pay it, but not otherwise; and when paid, the treasurer shall take a receipt therefor on the back, and shall cancel the warrant with a canceling hammer, and shall register, file and preserve the same [Acts 1859, ch. 138, § 7, p. 227.]'.

'Burns' § 49-1810.—The auditor of state shall at no time draw a warrant upon the treasurer of state unless there be money in the treasury belonging to the fund upon which the same is drawn to pay the same, and in conformity to appropriations made by law, and on money actually in the treasury subject to the payment of the same; and the auditor of state shall enter upon his books the number, date, payee, and amount of every draft in favor of the treasurer of state, and properly charge and credit the same to the appropriate fund, so as to keep an exact debit and credit account with each particular fund in the treasury; and the auditor shall carefully file and preserve such claim as his voucher for issuing the warrant. [Acts 1859, ch. 138, § 8, p. 227; 1937, ch. 168, § 1, p. 873.]'

Burns' § 49-1702.—'Duties.—He shall: * * * Fifth. Examine and liquidate the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law; and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the legislature; and no allowance shall be made to refund moneys from the treasury without his statement either for or against the justice of the claim.'

"7. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to the 'due course of law' clause of Art. 1, Sec. 12 of the Indiana Constitution and the 'due course of law' clause of the 5th and 14th Amendments of the United States Constitution in the following particulars:

a. The incumbent Auditor of State, who took office on December 1, 1968, was never made a party to the action in mandate decided by this Court on December 31, 1968;

b. The incumbent Auditor of State was introduced into this action without 'the same notice . . . given

in the same manner as required for defendants in the commencement of an action' as required by Acts of 1881 (Spec. Sess.), ch. 38, sec. 848.

c. The plaintiff in this cause neither requested this Court to substitute the incumbent Auditor of State for her predecessor in office nor took any other action that might be appropriate to making the incumbent Auditor of State a defendant in this action in mandate.

d. This Court, on October 21, 1969, without having been petitioned by any party to this action, did, *sua sponte* and without notice, substitute as a party defendant the incumbent Auditor of State for her predecessor in office, all without authority of law.

"8. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 23, of the Indiana Constitution; Art. 3, Sec. 1 of the Indiana Constitution; and the 'equal protection' clause of the 14th Amendment of the United States Constitution, in that without an appropriation it directs the distribution of general tax funds, belonging to all people of the State of Indiana, to the relator or its successor in interest. In addition, such order, if it is considered as an exercise of the Legislative power, would be Special and Local Legislation under Art. 4, Sec. 22 (7) and Art. 4, Sec. 23, of the Indiana Constitution.

"9. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 12, of the Indiana Constitution; Art. 4, Sec. 24 of the Indiana Constitution; the 'due process' clause of the 5th and 14th Amendments of the United States Constitution in that said order is now used as an execution against the State without extension of the state's immunity to this respondant.

"10. The order of this court of December 16, 1969, is in excess of the Court's jurisdiction and repugnant to Art. 1, Sec. 23, of the Indiana Constitution; Art. 3,

> Sec. 1 and Art. 10, Sec. 1, of the Indiana Constitution; the 'equal protection' clause of the 14th Amendment and the 'due process of law' clause of the 14th Amendment of the United States Constitution, in that it in effect provides that the inheritance tax imposed by state law is to be collected in 91 counties for the benefit of the State and in one county for the benefit of the county, a provision which is adopted by the Legislature would be Special and Local Legislation under Art. 4, Sec. 22 (7) and Art. 4, Sec. 23, of the Indiana Constitution."

At pages 15 to 17 of Respondents' Brief, it is asserted that *Doerech v. Doerech* (1938) 214 Ind. 559, 16 N.E. 877 has been overruled.

That case held that the courts had no power to enter judgment for the attorney of record in the case unless there was a statute granting that power.

Burns' Ind. Stat. Ann. (1968 Repl.), Sec. 3-1216, granted that power in divorce cases.

No such statute exists for mandate actions.

All of the questions raised in Petitioners' Answer to Rule to Show Cause were acknowledged by the Appellate (trial) Court, to be questions previously presented to it. See Petition in Cause 610, Appendix A-6 where the court said:

> "The defenses raised in behalf of the Auditor in the Contempt Proceedings were not new or novel—they were the same issues we have determined before."

CONCLUSION

For the above reasons Petitioners respectfully suggest that a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Indiana.

Respectfully submitted,

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